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In The
Supreme Court of the United States

VICTORIA WILSON,
UNITED STATES COMMISSION ON CIVIL RIGHTS,
MARY FRANCES BERRY, AND CRUZ REYNOSO,
Petitioners,

v.

UNITED STATES OF AMERICA and
PETER N. KIRSANOW, in his official capacity as
Member, United States Commission on Civil Rights,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Leon Friedman
Counsel of Record
148 East 78th Street
New York, NY 10021
(212) 737-0400

Counsel for Petitioner Victoria Wilson

Geoffrey F. Aronow
Paul S. Mandell
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Petitioner Victoria Wilson

Theodore V. Wells, Jr.
Julia Tarver
David W. Brown
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue Of The Americas
New York, NY 10019
(212) 373-3000

Counsel for United States Commission on Civil Rights, Mary Frances Berry and Cruz Reynoso

David T. Goldberg
99 Hudson Street
New York, NY 10011
(212) 334-8813

Counsel for Petitioner Victoria Wilson

THE LEX GROUP[DC] • One Massachusetts Ave., NW • Suite 670 • Washington, DC 20001
(202) 789-2400 • Fax: (202) 789-1911 • www.thelexgroupdc.com

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by ignoring the plain language of the governing statute of the United States Commission on Civil Rights, which provides that "[t]he term of office of each member of the Commission shall be 6 years," 42 U.S.C. § 1975(c), and by reading back into that statute a provision for lesser terms for interim appointments that Congress had specifically eliminated in 1994, and thereby improperly truncate the term of office of Commissioner Victoria Wilson?

2. Did the Court of Appeals erroneously decide that midterm vacancies on the United States Commission on Civil Rights should be filled pursuant to various policy preferences and executive branch practice instead of the unambiguous statutory language written by Congress, and thus threaten the independence of this unique watchdog agency?

RULE 29.6 STATEMENT

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 16

THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION WITH FAR REACHING EFFECTS ON THE U.S. COMMISSION ON CIVIL RIGHTS 16

A. The Commission Act Provides, Unambiguously, For A Six-Year Term 17

B. The Court of Appeals' Reliance On "Presidential Practice" With Respect To "Delayed" Appointments Violates Separation of Powers Principles 20

C. Canons Against "Absurd Results" Are Not Licenses For Disregarding Statutory Meaning Here 26

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases:

Atlantic Mut. Ins. Co. v. Comm'r of Internal Revenue, 523 U.S. 382 (1998) 26

Barnhart v. Sigmon Coal Co., 122 S. Ct. 941 (2002) 5

Berry v. Reagan, 732 F.2d 949 (D.C. Cir. 1983) 8

Booth v. Churner, 121 S. Ct. 1819 (2001) 18

Caminetti v. United States, 242 U.S. 470 (1917) 17

Chertkof v. United States, 676 F.2d 984 (4th Cir. 1982) 18

Connecticut v. Teal, 457 U.S. 440 (1982) 7

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 18

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 4, 15

Hannah v. Larche,
363 U.S. 420 (1960) 8

Helvering v. Hallock,
309 U.S. 106 (1940) 22

In re Request for Assistance,
848 F.2d 1151 (11th Cir. 1988) 19

Jones v. United States,
526 U.S. 227 (1999) 15

Keppel v. Tiffin Sav. Bank,
197 U.S. 357 (1905) 4

Lorillard v. Pons,
434 U.S. 575 (1978) 21

Miranda v. Arizona,
384 U.S. 436 (1966) 7

National Ass'n of Broadcasters v. Librarian of Congress,
146 F.3d 907 (D.C. Cir. 1998) 18

Quackenbush v. United States,
177 U.S. 20(1900) 17

Park *'N Fly, Inc. v. Dollar Park & Fly, Inc.*,
469 U.S. 189 (1985) 19

Pension Benefit Guaranty Corporation v. LTV Corp.,
496 U.S. 633 (1990) 22

Russello v. United States,
464 U.S. 16 (1983) 20

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 7

Swain v. Alabama,
383 U.S. 202 (1965) 7

United States v. Ron Pair Enterp., Inc.,
489 U.S. 235 (1989) 17, 26

Statutes:

2 U.S.C. § 437c (2001) 2-3

5 U.S.C. § 7104 (2001) 3

15 U.S.C. § 41 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1975(c) ..... *passim*

Pub. L. No. 85-315, 71 Stat. 634 (1957) 6

Pub. L. No. 94-135, 89 Stat. 728 (1975) 7

Pub. L. No. 95-478, 92 Stat. 1513 (1978) 7

Pub. L. No. 98-183 § 2(b)(2)(B) 2

Pub. L. No. 98-183, 97 Stat. 1301 (1983) 8

Pub. L. 103-419 § 2(c),
108 Stat. 4338 (1994) 10

Legislative History:

Hearings on Confirmation of Members of the U.S. Commission on Civil Rights Before the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. (1958)....7

103 Cong. Rec. 16 (1957)....7

H.R. 4999, 103d Cong. (1994)....9, 10

Other Authorities:

FOSTER R. DULLES, THE CIVIL RIGHTS COMMISSION 1957 (1968)....8

Robert Caro, *The Years of Lyndon Johnson: Master of the Senate* (2002)....6

N.Y. Times, at A1, col. 4 (Nov. 18, 1972)....8

PETITION FOR A WRIT OF CERTIORARI

Victoria Wilson ("Wilson") and the United States Commission on Civil Rights (the "Commission") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 9, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 290 F.3d. 347 (D.C. Cir. 2002) and is reproduced in Appendix ("App.") A at 1a-28a. The oral opinion and order of the District Court for the District of Columbia is unreported and is reproduced in App. B at 29a-38a.

JURISDICTION

The opinion of the United States Court of Appeals Court for the District of Columbia Circuit was issued on May 9, 2002 and its judgment was issued on the same day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1975(c): "The term of office of each member of the Commission shall be 6 years. The term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994."

STATEMENT OF THE CASE

Introduction

This case raises important issues involving all three branches of government. When the D.C. Circuit Court of Appeals relied on its policy preferences instead of the unambiguous language written by Congress, it threatened the independence of the Commission, which is uniquely responsible for investigating denials of equal protection. Similarly, the Court of Appeals also improperly used purported "executive practice" to trump the plain meaning of the Commission's governing statute.

Petitioner Victoria Wilson is a member of the United States Commission on Civil Rights, appointed in January 2000, under a statute providing that "the term of office of each member * * * shall be 6 years." That statute, unlike those establishing scores of other governmental bodies – and unlike the prior version of the Civil Rights Commission Act, *see* Pub. L. 98-183 § 2(b)(2)(B) – provides for no differential treatment for the terms of individuals whose predecessors served incomplete terms. *Compare, e.g.*, 15 U.S.C. § 41 (Federal Trade Commission Act) (providing that "any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed"); 2 U.S.C. §

437c (2001) (Federal Election Commission) (same); 5 U.S.C. § 7104 (2001) (Federal Labor Relations Authority) (same).[1]

In 2001, President Bush sought to replace Wilson because he believed that her term of office was not the six years provided for in the statutory text, but rather the 23 months that were remaining in the term of her predecessor, Judge A. Leon Higginbotham, at the time of his death. Concurring with this position, the Court of Appeals ruled that Wilson's term was complete, reversing the decision of the district court, which had held that Wilson should serve her full six-year term.

In reaching that result, the Court of Appeals pronounced the statute "silent" and "ambiguous" with respect to the length of terms for individuals in Wilson's position, concluding that it "simply ma[de] more sense" to construe the law as providing truncated, interim terms. (App. 13a) This interpretation, the court explained, was supported (1) by evidence of "the background understandings against which [Congress] legislates" (App. 16a) when it enacted the 1994 reauthorizing statute, chiefly, a "consistent [presidential] practice" of counting *delays* in appointment as part of an appointee's term (App. 17a), and (2) by a variety of pragmatic and policy concerns, principally that allowing for full six-year

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[1] In an appendix to their Court of Appeals Brief, Petitioners provided a list of 40 separate agencies whose governing statutes contained specific provisions that provided for interim appointments to fill the unexpired term of a predecessor who had not completed his or her term of office. Appellees' Ct. of Appeals Br. at 29.

terms in cases like Wilson's could leave open the door to schemes where Commissioners colluded with like-minded Presidents to frustrate their successors' powers of appointment. (App. 26a)

Even if the appointment regime chosen by the Court of Appeals actually "makes more sense" for the Commission, it is not the one that Congress enacted into law in 1994. As this Court has repeatedly emphasized, "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court," *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982). On the contrary, the rule that the Court of Appeals read into the statute and enforced against Petitioner Wilson, limiting the tenure of appointees whose predecessors do not serve out their terms, is the rule that Congress had specifically *deleted* when it enacted the amended statute under which Wilson was appointed. Courts are simply not free to reinsert a provision in a law that Congress has specifically eliminated. *See, e.g., Keppel v. Tiffin Sav. Bank*, 197 U.S. 357, 373 (1905) ("[I]t cannot in reason be said that the omission to impose [a certain] penalty [when it amended the bankruptcy statute] gives rise to the implication that it was the intention of Congress to reenact it."). When Congress's specific intentions on the issue in dispute are so manifest, this Court's precedents do not allow the search for countervailing presumptions and policy considerations as undertaken here by the Court of Appeals.

The Court of Appeals further erred in concluding that "background considerations" (App. 22a) support truncating Commissioner Wilson's term. The "executive practice" on which that court based its construction is both legally and logically problematic.

In fact, what the Court of Appeals termed "executive practice" is nothing more than the dates printed on several presidential commissions that do not comport with the unambiguous language of 42 U.S.C. § 1975(c), and that certainly cannot operate to alter its plain meaning.

Moreover, the amendments to the Commission's governing statute that Congress enacted in 1994 help to ensure that the Commission continues to function as the nation's only truly independent civil rights watchdog agency. The statute maintains various structural protections such as bipartisan balance, even though it no longer mandates that appointments be made pursuant to a strict staggered-term/vacancy-appointment regime. Accordingly, implementing the statute as written, *i.e.*, allowing full terms for commissioners who, like Wilson, are appointed to fill mid-term vacancies, would *not* yield "absurd" results. (App. 26a) Under this Court's precedents, the statute does not produce the sort of "absurd" result that allows a court to overrule plain meaning. As this Court recently noted in addressing a similar argument for an "absurd results" test: "Respondents answer correctly that this Court rarely invokes such a test to override unambiguous legislation." *Barnhart v. Sigmon Coal Co.*, 122 S. Ct. 941, 945 (2002).

The consequences of the Court of Appeal's decision are far-reaching. First, the ruling adversely affects the autonomy and effectiveness of the U.S. Commission on Civil Rights. The Commission has been charged with performing an important mission, and history shows that its mandate is best fulfilled when the Commission operates free from presidential interference.

Further, the decision has introduced needless uncertainty and friction into already constitutionally delicate relationships (1) between Congress and the Executive and (2) between incoming and outgoing presidential administrations. Unusually, the statute in question vests appointment power in Congress, as well as the President. By acceding to the President's desire to truncate the term of his predecessor's nominee, the decision also necessarily limited Congress's power. Moreover, while the court acknowledged that congressional and presidential practice evince different understandings of the statute, it gave weight to the latter only, on the remarkable ground that executive practice is the surer indicator of the "background against which Congress was legislating." (App. 10a)

Statutory Background

The Civil Rights Commission Act

For nearly a half century, the U.S. Commission on Civil Rights has played a vital, sometimes controversial, role in securing equal rights for all Americans. Established in 1957 as the centerpiece of the first civil rights legislation to pass Congress since Reconstruction, Pub. L. No. 85-315, 71 Stat. 634 (1957), the Commission has been assigned responsibility for investigating denials of equal rights and recommending appropriate remedial measures.[2]

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[2] The background to passage of the 1957 Civil Rights Act is at the center of the recent biography of President Lyndon B. Johnson. *See* Robert Caro, *The Years of Lyndon Johnson: Master of the Senate* at 685-990 (2002).

As this Court has observed, Commission studies are an impetus to landmark federal legislation, including the Voting Rights Act, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Equal Employment Opportunities Act of 1972, *see Connecticut v. Teal*, 457 U.S. 440, 449 n.10 (1982), and the Age Discrimination Act; *see* Pub. L. No. 94-135, 89 Stat. 728 (1975) (directing Commission to study Age Discrimination); Pub. L. No. 95-478, 92 Stat. 1513 (1978) (incorporating Commission recommendations); *see also Miranda v. Arizona*, 384 U.S. 436, 446 (1966) (citing Commission studies of police misconduct); *Swain v. Alabama* 383 U.S. 202, 231 (1965) (citing studies of jury exclusion).

Beginning with President Eisenhower's initial round of appointments – and perhaps on account of the unsuccessful congressional objections to its creation[3] – the Commission's members have strived to establish traditions of bipartisanship, deliberation and insulation from presidential control.[4] For a quarter

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3 *See, e.g.*, 103 Cong. Rec. 16,263-75, 16,383-456 (1957).

4 For example, in his confirmation hearing as the Commission's first Chair, John A. Hannah, testified:

> I would like to emphasize that the Commission on Civil Rights is an independent agency of the Government, in no manner connected, even administratively, with the Department of Justice* * * * The emphasis of the commission and its staff is on objectivity, and, as the commission views it, objectivity presupposes getting all of the facts.

Hearings on Confirmation of Members of the U.S. Commission on Civil Rights Before the Senate Comm. on the Judiciary, 85th Cong., 2d Sess., at 18-19 (1958).

century, these efforts were largely successful - though the Commission's mandate to serve as a watchdog agency over other branches of government assured that it could not steer entirely clear of conflict. *See Hannah v. Larche*, 363 U.S. 420 (1960) (sustaining Commission's authority to subpoena voting records and hold hearings); *see also* FOSTER R. DULLES, THE CIVIL RIGHTS COMMISSION 1957-65 (1968) at 182 (noting conflict with President Kennedy over report about University of Mississippi desegregation); *N.Y. Times*, Nov. 18, 1972, at A1, col. 4 (reporting that President Nixon had sought and accepted Chair's resignation based on differences over school busing policies).

The Commission's institutional role was severely tested in the early 1980s, when the President sought to replace Commission members. This effort provoked alarm in Congress and the civil rights community, giving rise to acrimonious litigation, *Berry v. Reagan*, 32 *Empl. Prac. Dec.* (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983) (enjoining President from removing Commissioners), *vacated as moot upon expiration of statutory authorization*, 732 F.2d 949 (D.C. Cir. 1983) (per curiam), and creating a real prospect that Congress would allow the Commission to expire, rather than continue it on the Executive Branch's terms.

In November 1983, Congress and the President reached a compromise, codifying protections to ensure the Commission's independence. *See* Pub. L. No. 98-183, 97 Stat. 1301 (1983). Under the new statute, the Commission would consist of eight members, rather than the previous six, who would be subject to presidential removal "only for neglect of duty or malfeasance in office." *Id.* § 2(d). The law assigned power to appoint four of the Commissioners

to the leadership in the House and Senate, and directed that "[n]ot more than four of the members shall at any one time be of the same political party." *Id.* § 2(b)(1).

Significantly for this case, the 1983 legislation provided that:

> The term of office of each member of the Commission shall be six years; except that (A) members first taking office shall serve as designated by the President, subject to [bipartisanship] provisions, for terms of three years, and (B) *any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed.*

Id. § 2(a)(C)(2), (3) (emphasis added). The 1983 legislation specified that the "provisions of this Act shall terminate six years after its date of enactment." *Id.* § 8.

The latter provision notwithstanding, "the Commission continued to operate via the process of annual appropriations" until it was reauthorized in 1994. (App. 4a) Notably, the text of the bill first introduced to reauthorize the Commission, H.R. 4999, 103d Cong. (1994), would have amended the Commission Act to provide: "the term of office of each member of the Commission shall be six years *and the current staggering of terms shall continue in effect.*" *Id.* § 2(c) (emphasis added). The version that the Committee on the Judiciary reported to the full House, however, contained different language. This version, passed into law in October 1994, provided:

> The term of office of each member of the Commission shall be 6 years. The term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994.

Civil Rights Commission Amendments Act of 1994, Pub. L. 103-419 § 2(c), 108 Stat. 4338, 4338-39 (1994), codified at 42 U.S.C. 1975(c) (2001).

In addition to omitting language preserving the "current staggering of terms," Congress repealed the former provision limiting the length of terms of members appointed to fill "mid-term" vacancies. *Compare* H.R. 4999, 103d Cong. (1994), *with* 42 U.S.C. § 1975(c). Thus, the amended statute included two sentences addressing Commissioners' tenure in office: one that confirmed the existing terms of those already serving as of October 1994 and one, governing subsequent appointees, providing that the "term of office of each * * * shall be 6 years." 42 U.S.C. § 1975(c). Absent from the statutory text is language mandating a rigorous staggering of terms, let alone any language indicating that staggering be maintained by truncating the terms of members appointed to openings created through a predecessor's resignation or death.

Proceedings Below

On December 6, 2001, President Bush, in apparent reliance on the view that Commissioner Wilson's term had terminated on November 29, 2001 – the date when the tenure of her deceased predecessor would have been complete – purported to appoint Respondent Kirsanow to the Commission. (App. 1a)

The Commission took the position that Wilson's term was unexpired, as did Wilson, who understood that she had been appointed for a full six-year term. (App. 5a)

On December 10, 2001, the United States of America and Kirsanow filed suit in the District Court for the District of Columbia, seeking a declaratory judgment that Commissioner Wilson's term had expired and that Kirsanow was entitled to serve on the Commission. *See* 290 F.3d at 351. (App. 5a-6a)

On February 4, 2002, the district court (Kessler, J) issued an oral ruling entering summary judgment in favor of Wilson and the Commission.[5] Citing the importance of hewing to statutory text, and thereby "avoid[ing] the unreliable guessing game about what Congress intended," the court found the 1994 Commission Act "perfectly clear" with respect to Commissioners in Wilson's position. (App. 33a) The amended act

> contains no exceptions or qualifications for appointments * * * to fill unexpired terms. Rather, its plain language clearly requires that *all* Commissioners serve six-year terms, regardless of whether, as in this case, their predecessors [did not] complete[] their terms.

(App. 32a) (emphasis added)

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5 The district court had earlier granted the motion of the Commission, its Chair, Mary Frances Berry, and its Vice-Chair Cruz Reynoso, to intervene as defendants in this action. (App. 5a)

In holding that Wilson was entitled to serve her own six-year term, the district court emphasized that Congress had *deleted* language establishing the maintenance of rigid staggering and abbreviated "vacancy" appointments that the United States sought to have read into the statute. The district court further indicated that it was unconvinced by arguments that interpreting the statute as written would jeopardize the Commission's "integrity and credibility." (App. 35a) "Important protections," the court explained - such as ones prescribing fixed six-year terms, removal for cause only, and division of appointments between the President and Congress - would remain part of the statute in any event. (App. 36a)

The Court of Appeals reversed. First, invoking a long-recognized distinction between "two kinds of official terms" - those which "run[] with the person" and those which "run with the calendar" (App. 9a), the court pronounced "ambiguous," not plain, the meaning of the language providing that "[t]he term of office of each member of the Commission shall be 6 years." (App. 10a)

In resolving this "ambiguity" in Wilson's case, the court attached great significance to the next sentence of § 2(c): "The term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994." Rather than read that sentence as merely affirming that then-incumbent Commission members' terms would run their course, unaffected by the reauthorization legislation, the Court of Appeals treated it as an implicit limitation on the terms of post-1994 appointees, like Wilson, whose predecessors served incomplete

terms. Because allowing the initial members to complete their appointed terms would have the effect of maintaining a stagger, the court reasoned, the sentence should be treated as the equivalent of language mandating that staggering be continued.

The court then canvassed reasons why its construction of the Commission Act purportedly "ma[de] more sense" than one where Wilson's term was six years. (App. 6a) The court first noted disputed evidence indicating that a number of Presidential appointees to the Commission, including persons named both before and after the 1994 amendment, had been given less than full terms (*i.e.*, six years minus the period the White House had delayed in naming them). This evidence concerning "delayed" appointments was key, the court explained, because:

> We have difficulty believing that Congress *sub silentio* created two different tracks with full six-year terms for those commissioners who succeeded appointees who by reason of death or resignation did not serve out their full terms, but truncated terms for those who succeeded members who served for six years but whose vacancy was not immediately filled by presidential appointment. Nothing in section 1975(c) gives any indication that the phrase "the term of office of each member of the Commission" has two different meanings for two distinct classes of commissioner not otherwise recognized in the statute.

(App. 14a)

While recognizing that the Executive's understanding of the statute was not entitled to deference as such, the court asserted that its practice with respect to delayed appointments remained highly significant, both because "the Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating" and because "Congress is presumed to be aware of established practices and authoritative interpretations of the coordinate branches." (App. 17a)[6]

The Court also stated that limiting Wilson's term was in harmony with "the consistent practice of the Executive Branch with respect to the filling of midterm vacancies on * * * bodies with staggered term members" (App. 19a), citing an 1882 Attorney General opinion that had concluded that a Commissioner of the

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[6] The Court of Appeals claimed support from an "unbroken position of the Attorney General and the Justice Department on executive appointments," quoting a 1999 Office of Legal Counsel Opinion, *Term of a Member of the Mississippi River Commission*, that had explained:

> Ordinarily, when a statute provides for an appointee to serve a term of years, the specified time of service begins with the appointment. *Case of Chief Constructor Easby*, 16 Op. Att'y Gen. 656 (1880). *A different rule generally applies to commissions whose members have staggered terms.* There, to preserve the staggering required by statute, each member may serve only until the passage of the specified number of years *calculated from the expiration of his predecessor's term*, even if the member's confirmation and appointment take place after that prior term has expired.

(App. 17a-18a) (emphasis added)

District of Columbia, appointed after his predecessor failed to serve out a full term, should serve only for the remainder of his predecessor's unexpired term. *See* 17 Op. Att'y Gen. 476. The governing statute there was "remarkably similar" to the Commission Act, the Court explained, in that it provided "for staggering with respect to the initial appointment of the two Commissioners, but [was] silent about * * * filling of vacancies." (App. 19a)

Only then did the court turn to what it acknowledged to be Petitioners' "strongest argument": that Congress's elimination of the statutory language providing that "any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed" should foreclose re-imposition of that same rule by judicial construction. (App. 24a) Conceding that this textual argument was "not without force," the court declared that the inference supported by the amended statute's "silence" with respect to the terms of Commissioners whose predecessors left early nonetheless was outweighed by the cited "contextual considerations," as well as by certain canons of statutory interpretation. (App. 25a)

First, citing the rule that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so," *Jones v. United States*, 526 U.S. 227, 234, (1999), the court found significance in the absence of "affirmative[] indication" of congressional intent "to change the established practice for appointing members of the Commission." (App. 25a) The court next indicated that the construction Petitioners argued for might yield an even more unwelcome result: that in light of

the terms of Wilson's presidential commission document, which indicated a November 29 expiration date, a conclusion that Commissioners can only serve six-year terms might mean that she was never validly appointed in the first place. (App. 20a)

The court finally expressed concern that allowing members in Wilson's position to serve full terms would lead to "'absurd results'" (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575(1982)), *e.g.*, by permitting "concerted resignations near the end of a President's term, [and thereby] allowing an outgoing President to appoint several members of the Commission at once, precluding his successor from appointing any members of the Commission." (App. 26a) The "absence" of any similar policy justification favoring the construction advanced by Petitioners, the court concluded, "provides yet an additional reason" why its resolution of the statutory construction issue was the correct one. (App. 26a)

REASONS FOR GRANTING THE WRIT

THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION WITH FAR-REACHING EFFECTS ON THE U.S. COMMISSION ON CIVIL RIGHTS.

The decision below resolved an important and delicate question of federal statutory interpretation in a manner that was irreconcilable with this Court's teaching. This Court's review is warranted not only because of the significance of the statute involved and the work of the Commission it affects, but also because of the broader separation of powers concerns the decision implicates.

Moreover, although the decision below recognized that there has not been agreement between the two branches that wield appointment authority under the Act as to the meaning of the term-of-office provision, it gave weight only to the (ostensible) presidential "practice," on the improbable ground that it was a reliable indicator of *legislative* intent. By questioning the *validity* of an appointment for which the commission and the statutory authority are inconsistent - and by citing Wilson's *own commission* as the primary evidence of the "practice" that "guided" its statutory interpretation, the decision below undercut a clear and venerable legal principle: that "the terms of the commission cannot change the effect of the appointment as defined in the statute," *Quackenbush v. United States*, 177 U.S. 20, 27 (1900).

A. The Commission Act Provides, Unambiguously, For A Six-Year Term.

Where, as here, the language of a statute is plain, the court's inquiry should end with the language of the statute, as in such circumstances, "the sole function of the courts is to enforce [the statute] according to its terms." *United States v. Ron Pair Enterp., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The simple, unambiguous text of the statute contains a single provision, creating a single term of office - six years - and includes no distinction based on whether or not a predecessor completed his term.

Inexplicably, in deciding the length of Wilson's term, the Court of Appeals treated statutory text, structure and history as if they were mere factors to weigh against amorphous policy considerations. This

Court's cases commend a fundamentally different approach: that text, structure and history are the preeminent repositories of statutory meaning - and in cases such as this one, where these are unambiguous, it is error to go beyond them. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

Indeed, when it rewrote 42 U.S.C. § 1975(c), Congress did not merely neglect to include a provision governing mid-term vacancies that it had written many, many times in the past, *see* App. to Appellees' Ct. of Appeals Br., it specifically deleted a predecessor provision prescribing that very rule. *See Chertkof v. United States*, 676 F.2d 984, 987 (4th Cir. 1982) (providing that when words of plain meaning are excised, the deletion of such language "almost compels the opposite result"). Thus, the 1994 Act is not "silent" with respect to Wilson's term - it prescribes a six-year term for "each member of the Commission." 42 U.S.C. § 1975(c). Nor can it properly be said that Congress, through statutory "silence," delegated to the judiciary the task of deciding whether there should be a "one track" or a "two-track" appointment regime. Here, Congress provided for and then removed a special rule for "vacancy" appointments. It was error for the Court of Appeals to read it back in. *See Booth v. Churner*, 121 S. Ct. 1819, 1824 (2001) (holding that elimination of language in prior version of statute removed requirement previously found in law: "Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning."); *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 919 (D.C. Cir. 1998) ("When the

legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute.") (quoting *In re Request for Assistance*, 848 F.2d 1151, 1154 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989)).

In reaching the contrary result, the decision below faulted Petitioners for failing to consider the amended "statute as a whole," suggesting that giving effect to the ordinary meaning of the first sentence of § 2(c) would put it into conflict with the next sentence, concerning terms of the Commission's "initial [1994] membership." If that second sentence of the statute is understood to mean that "the current staggering of terms shall continue in effect," the Court continued, the terms of "vacancy" appointees, such as Wilson, should be truncated, so as to maintain the stagger.

When the statute is given its plain meaning, however, there is no tension between the two sentences. By its words, the second sentence does not address the terms of individuals, like Wilson, who were appointed after 1994. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, (1985) ("Statutory construction must begin with * * * the assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose."). Construing a sentence reading "term of each member * * * in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994" as equivalent to one providing that "the current staggering of terms shall continue in effect," is undeniably not the most natural reading of the words Congress enacted into law. Moreover, that reading becomes singularly implausible in light of Congress's

decision to use the former sentence, which specifically refers to the "initial membership" of the Commission *in place of* the latter sentence, which generally provides for staggering. *Cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").[7]

The only further textual point made in the decision below – that Congress may have omitted language in order to make the Act more "concise" – only undercuts its interpretation. The original, rejected language concerning staggering was both a *more concise* and a less opaque way of expressing the principle the court concluded that Congress had intended to enact.

B. The Court of Appeals' Reliance On "Presidential Practice" With Respect To "Delayed" Appointments Violates Separation of Powers Principles.

1. Pre-1994 Practice is Irrelevant.

The D.C. Circuit improperly allowed the executive branch, through its recent appointment practices, effectively to rewrite the statute that

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[7] Although the decision below assumed that continuing the terms of members incumbent in September 1994 would "lock in" the original staggering, the history of appointments to the Commission does not bear that out. Some of the staggers had already "slipped" by the time the Act was amended. Petitioners submitted evidence below that indicated that new members were appointed in 1987, 1988, 1990, 1993, 1994, 1995, 1999, 2000, and 2001. Ct. of Appeals JA at 40.

Congress passed in 1994, and erred seriously when it relied on "executive practice" to resolve the supposed textual "ambiguity." Noting that "every *presidential* appointee to the Commission *since 1983* has been appointed to a term of office expiring six years from the date her predecessor's term expired" (App. 16a), the court erroneously focused on *presidential* practice, although Congress also shared appointment power and had a different practice, and focused on the practice *before the statute was amended.* The court reasoned that: (1) because the statutory text should not be given "two meanings," with respect to delayed, as against vacant-office, appointments, and (2) because the White House had counted delays toward certain of its nominees' terms, Congress should be presumed to have intended to conform the 1994 Act with this "executive practice." (App. 16a)

This reasoning encounters difficulty every step of the way. First and most obvious, "executive practice" under the former version of the statute is no indication of what Congress intended when it changed the statutory provision. It is one thing to say that Congress "ratifies" past practice when it reenacts identical statutory language, *see, e.g., Lorillard v. Pons,* 434 U.S. 575, 580 (1978), or even when it leaves relevant terms alone when changing others. But no canon of construction supports the reasoning that, by significantly changing the language, Congress intended to endorse the executive branch's interpretation of the repealed language. *Cf. id.* at 580 ("Congress is presumed to be aware of an administrative * * * interpretation of a statute and to adopt that interpretation *when it re-enacts a statute without change.*") (emphasis added).

2. The Court's Decision Wrongly Ignored the Significance of *the Congress's* Appointment Practice, Which Differed From Presidential Practice.

In contrast to the executive branch, Congress has appointed delayed appointees to the Commission to full six-year terms, rather than truncated terms. Accordingly, the court's reliance on a contrary post-enactment presidential "understanding" was untenable. Although the decision suggested that Congress somehow ratified the four recent presidential appointments by appropriating funds for the Commission without objecting to the length of the terms expressed on those four commissions, inaction of this sort is the most tenuous possible indication of legislative intent under any circumstances. *See Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."); *see also Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress."). Here it was particularly so.

Indeed, even assuming that Congress believed that the text of the White House commissions for "delayed" appointees was wrong, which assumes that Congress even knew what those documents said, it may have perceived no need to correct the mistakes, given the settled rule that the term provided for by statute trumps erroneous language in an officer's

commission.[8] Indeed, the erroneously abbreviated commission documents were, from the perspective of inter-branch relations, a self-inflected presidential wound, *limiting* unduly the terms served by executive appointees.

In any event, Congress's substantive actions under this statutory regime provides a far more direct, though also imperfect, window into whether Congress's appropriations should be treated as "endors[ing]" the theory that "delay appointments" (and, by implication, vacancy appointments) should be abbreviated. As the Court of Appeals noted only obliquely, *Congress* has made a delayed appointment under the Act for the full six-year period. (App. 18a) To the extent that the Court was correct that Congress's subsequent behavior concerning delayed appointments is important in deciding what the statute provides for nominees in Wilson's position, the understanding that Congress has acted on in exercising its own power is surely a better guide than an inference from its "failure" to correct White House documents through annual appropriation legislation.

Indeed, the congressional practice is the only one that fully avoids the "two track" approach that the decision below attacked as unsupported by the statutory text. If delay does not count against a nominee, every member of the Commission has the

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[8] Of course, the issue of the term a Commissioner was entitled to serve did not come into focus until President Bush attempted to remove Wilson. At that point, congressional objection to the "executive understanding" did emerge. *See* Def. Victoria Wilson's District Ct. Mot. to Dismiss or for Summ. J. at Ex. 6.

chance to serve six years. Counting delays against the nominee actually holds out the possibility - no less realistic than the scenarios that so troubled the Court of Appeals - that the President would leave an opposite-party slot unfilled, thereby penalizing both the eventual nominee and depriving the Commission of a full compliment of members.

3. The Court's Reliance On "Executive Practice" Inverts The Longstanding Rule That The Statutory Term Of Office - and Not The Language of A Commission - Is Legally Controlling.

The error of the Court's reliance on "practice" under the statute as a "guide" to statutory meaning is more broadly significant. Of the four post-1994 appointments by President Clinton relied on to ascertain the "presumptive" meaning of the statute, three were "delay" appointments. The fourth - and *only* "vacancy" appointment - was Wilson's. Although the court seemed to profess adherence to the longstanding rule that "the terms of [a] commission cannot change the effect of the appointment as defined by . . . statute," the primary evidence for concluding that Wilson's term had expired was the language of her commission.[9]

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[9] In fact, even as it cited the proposition, the Court took care to note that the language in *Quackenbush* was dictum, reinforcing the impression that the question actually remains unsettled. But unlike those discussed above, the "practice" of honoring the statute, rather than the commission language, is both truly "unbroken" - and, for the reasons cited, important.

Indeed, the court went still further in undermining this longstanding rule when it indicated that a plain-meaning construction might establish that Wilson had never been validly appointed in the first place. (App. 22a) (suggesting that if terms under the Act were for six-years only, the commission language appointing Wilson until 2001 "could be seen as an attempt by the President to appoint Wilson to a position that did not exist"). Reading the statute to conform to Wilson's commission language, the decision explained, avoided that result.

But both the court's readiness to treat "practice" (*i.e.*, the nominee's commission) as affecting statutory meaning and its professed concern for avoiding "invalid" appointments undermine the longstanding norm. Under this settled rule, a commission document that misstates an appointee's term of office never "invalidates" the appointment; the erroneous limiting language in the commission simply yields – indeed that was the thrust of the OLC opinion concerning the Mississippi River Commission cited by the Court of Appeals. (App. 17a) (concluding that, despite commission indicating shorter term, individual was entitled to serve nine-year term provided in statute). The rule is plainly correct as a matter of constitutional structure, in that the statute has withstood the rigors of the bi-cameralism and presentment requirements, while the commission document is prepared by Executive Branch clerks. Moreover, as an evidentiary matter, it brings substantial clarity to an area where ambiguity is especially unwelcome. Under the rule, individuals considering government service may be certain that their term of office will not be dependent on the correctness of a piece of paper; incoming

administrations have no incentive to scour commission documents for errors and courts are spared the difficulty of choosing both among competing subjective impressions and between competing exercises of presidential power (an appointment and a removal).

As a practical matter, the Court of Appeals decision drew this rule into question, and it has thereby undermined the certainty that is its greatest value.

C. Canons Against "Absurd Results" Are Not Licenses For Disregarding Statutory Meaning Here.

As a final justification for enforcing against Wilson the deleted provisions concerning staggering and vacancy appointments, the Court of Appeals repeatedly asserted that it would make no sense for Congress to have done what the 1994 Act is most fairly read to have accomplished: eliminating that regime, while retaining the other structural safeguards. This Court's precedents admonish that the power to look behind textual meaning in order to avoid "absurd results" is a narrow one. *See, e.g., United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989). Here there is, in fact, nothing "absurd" or "dangerous" about giving the statute its plain meaning in Wilson's case. While it is possible to *hypothesize* a scenario where resignations could be used "strategically," there is no suggestion that any such thing happened here. *See Atlantic Mut. Ins. Co. v. Comm'r of Internal Revenue*, 523 U.S. 382, 389 (1998) (declining to pronounce agency construction unreasonable "because *in theory*, it produces absurd results") (emphasis added). Judge Higginbotham,

Commissioner Wilson's predecessor, did not resign, but passed away, and the disputed presidential commission document gave President Clinton *less influence* than the law entitled him to.

Even more important, there are sound – not absurd – reasons why Congress would favor six-year terms for Commissioners without exceptions. Unlike the other structural protections, an abbreviated vacancy appointment provision comes at a cost to the Commission's effectiveness: Members who serve truncated terms are less likely to master the issues confronting the Commission before being required to step down, and talented individuals who might otherwise accept appointments might not be willing to accept only a brief opportunity for government service. Ct. of Appeals JA at 25 (statement by Victoria Wilson that she "[w]ould have never volunteered to go through such a rigorous investigation of [her] life and work" had she believed the term was less than two years).

Moreover, as the district court stressed, the structural protections that Congress unambiguously kept in place, limiting the number of presidential appointments and the Commissioners' partisan affiliations, constrain the extravagant manipulations about which the decision below expressed concern. Indeed, as noted above, the evidence indicated that rigorous "staggering" was not treated as a high priority before 1994, when it was the law.

On the other hand, the structural protections that Congress put in place would be no match for a President as bent on abusing the appointment power as the one hypothesized in the decision below. The

bipartisanship requirement could be defeated by a would-be nominee's changing party registration on the eve of her appointment. Or the President could purport to dismiss disfavored Commissioners, including congressionally-appointed ones, whose terms were unexpired by invoking trumped-up accusations of "malfeasance." Nothing in the text of the statute prevents the President (or the congressional appointing authorities) from simply refusing to make appointments, until the point that the Commission was deprived of a quorum. The point is, once one opens the door to this type of hypothesizing, there is little to limit the imagination as to potential abuses. But flights of imagination should not be the bases for statutory interpretation.

Finally, there is no evidence that the "evil" that preoccupied the Court below – a President conspiring with like-minded Commissioners to circumvent the rotation in office – was of any actual concern to Congress in 1983 or 1994. The Commission's history is one of members taking stands that are *in tension* with policies embraced by their presidential nominators, and events that gave rise to the 1983 Act primarily involved perceived abuses of the removal power, *i.e.*, ending the terms of Commissioners on the ground that they were insufficiently in sync with the incoming President.

Thus, there is little to be said for the policy bases the court below relied upon to overturn the district court's decision. That leaves the plain meaning of the statute, the history of the statutory language and Congress's actions in 1994. All support the district court's application of the statute – not that of the Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and order plenary briefing and argument or, in the alternative, summarily reverse the judgment below.

Respectfully submitted,

LEON FRIEDMAN
148 East 78th Street
New York, NY 10021
(212) 737-0400
Counsel of Record

GEOFFREY F. ARONOW
PAUL S. MANDELL
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

THEODORE V. WELLS, JR.
JULIA TARVER
Paul, Weiss, Rifkind,
Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

DAVID T. GOLDBERG
99 Hudson Street
New York, NY 10011
(212) 334-8813

Counsel for Petitioner

AUGUST 7, 2002

APPENDIX

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion
United States District Court for the
District of Columbia
Entered May 9, 2002 ..... 1a

Transcript of Status Call Before
The Honorable Gladys Kessler
Re: Oral Opinion
Entered February 4, 2002 ..... 29a

United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America
and Peter N. Kirsanow,
in his official capacity as Member,
United States Commission on Civil Rights, Appellants
v.

Victoria WILSON, et al., Appellees

No. 02-5047.

Argued May 1, 2002.
Decided May 9, 2002.
[Entered May 9, 2002]

Reversed and remanded with instructions.

Appeal from the United States District Court for the District of Columbia (No. 01cv02541).

Gregory G. Katsas, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellants. With him on the brief were Roscoe C. Howard Jr., U.S. Attorney, Douglas N. Letter, Jacob M. Lewis and Ara B. Gershengorn, Attorneys, U.S. Department of Justice.

Leon Friedman and Theodore V. Wells Jr. argued the cause for appellees. With them on the brief were Julia Tarver, Geoffrey F. Aronow and Paul S. Mandell.

Before: SENTELLE, RANDOLPH and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

On January 13, 2000, President Clinton appointed appellee Victoria Wilson to the United States Commission on Civil Rights under a commission expressly stating that the appointment was "for the remainder of the term expiring November 29, 2001," left vacant by the death in office of a prior member. After November 29, 2001, President Bush, treating Wilson's commission as having expired on that date, appointed appellant Peter Kirsanow to succeed her. At the next meeting of the Commission, that body recognized Wilson as a continuing member on her assertion that she was entitled to a full six-year term on the Commission running from January 13, 2000, to January 12, 2006. The United States and Kirsanow filed this action seeking a declaratory judgment that Wilson's term had expired and that Kirsanow is now a member of the Commission. The District Court granted summary judgment in favor of Wilson. The United States and Kirsanow appealed. Because we agree with appellants that Wilson's term had expired, we reverse the District Court and remand with instructions for it to enter summary judgment for the appellants.

I. Background

The United States Commission on Civil Rights ("the Commission") is charged with investigating allegations of deprivation of voting rights on the basis of "color, race, religion, sex, age, disability, or national origin." 42 U.S.C. § 1975a(a)(1). In addition the Commission is empowered to conduct studies and disseminate information relating to discrimination. *Id.* § 1975a(a)(2). The Commission's functions are purely investigatory and advisory-it has neither the power to enforce federal law, nor to promulgate any rules with the force of law. *See Hannah v. Larche*, 363 U.S. 420, 441, 80 S.Ct. 1502, 1514, 4 L.Ed.2d 1307 (1960); *cf. United States v. Mead Corp.*, 533 U.S. 218, 221, 121 S.Ct. 2164, 2168, 150 L.Ed.2d 292 (2001).

The Commission was first created in 1957, and as originally established was composed of six members serving open-ended terms at the pleasure of the President. *See* Pub.L. No. 85-315 § 101(b), 71 Stat. 634 (1957). Congress reauthorized and reorganized the Commission in 1983 by expanding it from six to eight members, providing that not more than four of the members could at any one time be from the same party, dividing the appointment power between the President and Congress, establishing that the President could only remove members for neglect of duty or malfeasance, and staggering the terms of the Commissioners. Specifically, the 1983 Act stated that the "term of office of each member of the Commission shall be six years; except that (A) members first taking office shall serve as designated by the President, subject to [provisions staggering the initial appointments], and (B) any

member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed." Pub.L. No. 98-183 § 2(b)(2), 97 Stat. 1301 (1983) ("the 1983 Act"). The staggering provisions created two groups of four commissioners each. The first group would serve for three years, at which point their successors would be appointed to six-year terms. The second group would serve for six years from the outset. *See id.* § 2(b)(3). Under this structure, the terms of office would be regularly staggered with half of them expiring every three years. The 1983 Act provided for the Commission to expire in 1989. Nonetheless the Commission continued to operate via the process of annual appropriations until reauthorized. In 1994 the Commission was formally reauthorized. Pub.L. No. 103-419, 108 Stat. 4338 (1994) ("the 1994 Act"). This Act has been dubbed an effort to "more concisely rewrite[ ] the 1983 [Act]." H.R.Rep. No. 103-775, at 4, *reprinted in* 1994 U.S.C.C.A.N. 3532, 3533 (1994). Like the 1983 Act, the 1994 Act provides that "[t]he term of office of each member of the Commission shall be 6 years." 42 U.S.C. § 1975(c). However, instead of the initial staggering provisions that followed in the 1983 Act, the 1994 Act merely provided: "The term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994." 42 U.S.C. § 1975(c). The Act did not contain any language referring to filling vacancies. The 1994 Act did preserve the division of appointment power between the President and Congress, as well as the requirements for partisan balance, and the limitations on presidential removal of members. *See* 42 U.S.C. § 1975(b), (e). The 1994 Act provided for the Commission to terminate on September

30, 1996, 42 U.S.C. § 1975d, however, it has again continued to operate pursuant to annual appropriations.

On November 30, 1995, then-President Clinton appointed retired Judge A. Leon Higginbotham to a six-year term as a member of the Commission. His commission stated that his appointment was "for a term expiring November 29, 2001." He replaced Arthur A. Fletcher, whose term expired on November 29, 1995. On December 14, 1998, Judge Higginbotham died in office. To fill this vacancy, President Clinton appointed appellee, Victoria Wilson, to the Commission on January 13, 2000. Her commission expressly states that her appointment was "for the remainder of the term expiring November 29, 2001." Treating Wilson's term as having expired on November 29, President Bush appointed appellant Peter Kirsanow on December 6, 2001, to succeed Wilson on the Commission. Kirsanow was administered the oath of office by D.C. Superior Court Judge Maurice A. Ross; however, the Chair of the Commission, Mary Frances Berry, refused to recognize him or allow him to participate in Commission activities. The Chair instead continued to recognize Wilson as a member of the Commission and allowed her to participate as such.

The United States and Kirsanow (collectively "appellants") filed this action in the United States District Court for the District of Columbia seeking declaratory relief against Wilson. The Commission, Mary Frances Berry (Chair), and Cruz Reynoso (Vice-Chair), moved to intervene. The United States objected that neither the Commission nor its officers in their official capacity have the right to appear in

litigation without the permission of the Attorney General, which they had not obtained. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party ... is reserved to officers of the Department of Justice, under the direction of the Attorney General."). The district court summarily permitted the intervention. As the United States has not raised this issue on appeal, claiming "it has no practical effect upon the issues presented, since Wilson herself is entitled to defend against the government's complaint," we do not decide whether this intervention was permissible. The parties filed dispositive motions and on February 4, 2002, the district court issued an oral ruling granting Wilson's motion for summary judgment.

The district court concluded that "the 1994 Amendments Act ... does not mandate regularly staggered terms. Rather, its plain language clearly requires that all Commissioners serve six-year terms, regardless of whether, as in this case, their predecessors completed their terms." Thus, under the district court's reading of the statute, Wilson would be entitled to serve a full six years, until January 12, 2006. The district court first found that the language of 42 U.S.C. § 1975(c) "is perfectly clear. It contains no exceptions, qualifications, not for delayed appointments and not for appointments to fill unexpired terms." Second, the court noted that a staggering provision had been proposed, but not adopted by Congress in the 1994 Act. Third, the district court relied on the removal of the staggering and vacancy provisions from the 1983 Act, holding that

"when Congress affirmatively deletes language which had been included in pre-existing legislation, then Congress means what it said."

Finally, the court rejected appellants' argument that failure to maintain staggering would undermine "the bipartisan nature of the Commission as well as its integrity and credibility." The court found "nothing to suggest that the absence of such a requirement would frustrate Congress' purpose." Although acknowledging that its ruling would eliminate "uniformly staggered terms," the court opined that its decision would not result in the "complete elimination of all staggering." Even so, the court reasoned that the "staggered term requirement was only one amongst a large constellation of protections that were introduced by the 1983 Act" and "[a]ll of these protections, except staggered terms, remain expressly included in the 1994 Act." The district court concluded that "[i]f Congress believes that the regularly staggered terms should be among these protections, then, of course, it is free to make its intention explicit by including express language in the statute."

The United States and Kirsanow filed this appeal.

II. Analysis

This case involves a pure legal question of statutory interpretation. Our review of statutory interpretation by a district court is *de novo*. *See, e.g., Butler v. West*, 164 F.3d 634, 639 (D.C.Cir.1999).

A.

We begin our analysis with the language of the statute. *See, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 122 S.Ct. 941, 950, 151 L.Ed.2d 908 (2002). "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' " *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)). In determining the "plainness or ambiguity of statutory language" we refer to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. at 846 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S.Ct. 2589, 2595, 120 L.Ed.2d 379 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991)).

The disputed provision, 42 U.S.C. § 1975(c) provides: "The term of office of each member of the Commission shall be 6 years. The term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994." Appellants contend, contrary to the district court's holding, that the language of the first sentence of § 1975(c) is ambiguous, as the expression "term of office" is subject to at least two plausible interpretations. Appellants concede that one very plausible interpretation of § 1975(c) is that advocated by Wilson and adopted by the district court: Each individual

member of the Commission, however appointed, whenever appointed, is entitled to serve a six-year period of time-*i.e.*, the term runs with the person. Under this interpretation, each member of the Commission would receive a six-year term running from the date of her appointment. However, appellants argue that another plausible reading of § 1975(c) is that the first sentence establishes six-year terms of office, beginning and ending on fixed dates, irrespective of whether and when individuals are appointed to fill them. Under this reading, each member of the Commission must be assigned to a fixed, six-year 'slot' of time-*i.e.*, the term runs with the calendar. We agree with appellants that the ambiguity in the first sentence of § 1975(c) permits either of the readings suggested.

As Attorney General Brewster explained more than a century ago, "[t]here are two kinds of official terms." *Commissioners of the District of Columbia*, 17 Op. Att'y Gen. 476, 476 (1882). One kind of "term" refers to a *period of personal service*. In that case, "the term is appurtenant to the person." *Id.* Another kind of "term" refers to a *fixed slot of time* to which individual appointees are assigned. There, "the person is appurtenant to the term." *Id.* at 479. In other words, a "term of office" can either run with the person or with the calendar. As an example of the latter, Article II of the Constitution provides that the President shall hold office during a "Term of four Years." U.S. Const. Art. II, § 1, cl.1. Even before enactment of the Twentieth Amendment, which established specific dates for the end of the President's term, it was understood that presidential terms ran four years with the calendar, not four years with the person, regardless of whether an

individual assumed office after his predecessor failed to serve out a full term. Thus, contrary to appellees' position, it is *not* clear that the expression "term of office ... shall be 6 years" found in § 1975(c) is unambiguous. Indeed, far from it. The very appointment of Wilson by President Clinton to serve only the remainder of Judge Higginbotham's term demonstrates the ambiguity in the statutory provision calling for six-year "term[s] of office." The district court erred in holding that § 1975(c) unambiguously requires that all Commissioners be appointed for six years, regardless of whether their predecessors completed their terms. This error undermines the district court's judgment, because the remainder of its analysis rests on that erroneous premise as its point of departure.

B.

Finding that the expression "term of office" in 42 U.S.C. § 1975(c) is ambiguous, we are left to resolve that ambiguity. In resolving the ambiguity, we consider the broader context of § 1975(c) and the structure of the 1994 Act as a whole, as well as the contextual background against which Congress was legislating, including relevant practices of the Executive Branch which presumably informed Congress's decision, prior legislative acts, and historical events. Finally, we explore the policy ramifications of the suggested interpretations of § 1975(c). Each of these considerations leads us to the conclusion that, in enacting the 1994 Act, Congress did not disrupt the staggering of terms of Commission members created in the 1983 Act. Therefore we hold that Wilson was appointed by President Clinton only to fill the unexpired term of Judge Higginbotham, as her commission indicates, and her service as a

Commissioner terminated on November 29, 2001. As a result, Kirsanow, having been validly appointed to a vacant seat on the Commission on December 6, 2001, for a term expiring November 29, 2007, and having taken the oath of office, is a member of the United States Commission on Civil Rights.

1.

Appellants argue that in order to properly interpret 42 U.S.C. § 1975(c) we must construe both of its two sentences together, rather than as separate and unrelated. Taken together, appellants contend that it is evident that the 1994 Act retained "fixed slots of time to which individual members of the Commission are 'appurtenant.' " The second sentence of 42 U.S.C. § 1975(c) provides that the "term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994," under the 1983 Act. The "initial membership" of the Commission is defined as "the members of the United States Commission on Civil Rights on September 30, 1994," in other words, the members then serving on the Commission pursuant to the 1983 Act. 42 U.S.C. § 1975(b). Appellants argue that in maintaining the staggering of "initial terms" of the Commission, as inherently provided for by the second sentence of § 1975(c), the 1994 Act perpetuated a self-replicating system of staggered terms. New terms begin based on when the old, staggered terms end. Thus the structure created by Congress in 1983 and preserved in 1994 would automatically endure.

Appellees would have us read the two sentences of § 1975(c) as unrelated. According to appellees, the first sentence alone sets the term of office for six years, and the second sentence simply addresses the transitional issue of the terms of the "initial membership" of the Commission, allowing the existing members of the Commission to finish the terms to which they had been appointed. However, as discussed in Part II.A, *supra*, read alone, the first sentence of § 1975(c) is ambiguous. It is susceptible to an interpretation that each member appointed to the Commission receives six years from her date of appointment, regardless of whether her predecessor left office early, and regardless of whether there was a delay in her appointment. This is the interpretation urged by the intervenors. This interpretation would not only grant Wilson a full six-year term, it would effectively extend the terms of others on the Commission. Yet, an equally plausible interpretation is that terms of the Commissioners run for six years with the calendar. Rather than counting from the date of appointment, the six years of members' term are counted from the expiration of their predecessors' term. This is the common practice of the Executive Branch in making appointments to staggered boards and commissions. *See, e.g.*, Office of Legal Counsel, Department of Justice, Memorandum for the Executive Clerk, "Term of a Member of the Mississippi River Commission," at 1 (May 27, 1999) (observing that "to preserve the staggering required by statute, each member may serve only until the passage of the specified number of years calculated from the expiration of his predecessor's term, even if the member's confirmation and appointment take place

after that prior term has expired"). Thus, despite any delay in appointment, a Commissioner's term would expire six years from the day her predecessor's expired. Both are six year terms-the question is which Congress intended here.

Reading the first sentence of § 1975(c) together with the second sentence, the latter provides an "anchor"-fixed times for terms of Commissioners to expire, based on the "term[s] of each member of the Commission in the initial membership of the Commission." It is "a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 1301, 146 L.Ed.2d 121 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 1504-05, 103 L.Ed.2d 891 (1989)). Thus, it is a more faithful construction of § 1975(c) to read it as a whole, rather than as containing two unrelated parts. It is the "classic judicial task" of construing related statutory provisions "to 'make sense' in combination." *United States v. Fausto*, 484 U.S. 439, 453, 108 S.Ct. 668, 677, 98 L.Ed.2d 830 (1988). The second sentence does indeed address the transitional issue of the terms of the "initial membership," but in doing so, it also creates a pattern of staggered appointments. Staggered terms must run with the calendar, rather than with the person, to preserve staggering. Thus, taken with the history and background against which Congress was legislating, discussed *infra*, it simply makes more sense to read § 1975(c) as creating terms of office running with the calendar from the date of expiration of a predecessor's

term. That being the case, any appointment to fill a vacancy for an unexpired term, such as Ms. Wilson's appointment, must only be for the duration of that unexpired term. For it to be otherwise would disrupt the fixed and staggered six-year terms that run with the calendar.

At oral argument, we raised with counsel for appellees the question of the effect of their proffered interpretation, as adopted by the District Court, on the terms of those members who, like Berry and Reynoso, were appointed to succeed commissioners who had served their full terms, when the successor did not take office until the lapse of some period of time after the termination of the prior commissioner's service. Counsel argued for a two-track application of the statute, contending that when an appointee's predecessor had served out her full term, but there was a delay in the nomination of the new appointee, that new appointee could permissibly serve less than a full six years, because such a discrepancy was only minor. However, when the appointee is replacing a predecessor who had failed to serve out a full term, such as here, the new appointee should serve a new, full six years from the date of her appointment. This anomalous result further undermines appellee's interpretation of the statute. We have difficulty believing that Congress *sub silentio* created two different tracks with full six-year terms for those commissioners who succeeded appointees who by reason of death or resignation did not serve out their full terms, but truncated terms for those who succeeded members who served for six years but whose vacancy was not immediately filled by presidential appointment. Nothing in section 1975(c)

gives any indication that the phrase "the term of office of each member of the Commission" has two different meanings for two distinct classes of commissioner not otherwise recognized in the statute. The lack of such differentiation and appellee's concession that "delayed appointees" serve terms shortened by the interval between the expiration of their predecessors' term and the date of their appointment further supports our interpretation that, read together, the two sentences of § 1975(c) create fixed six-year terms that run with the calendar.

Our interpretation is consistent with widely held traditional understandings of statutes defining terms of office. The second edition of *American Jurisprudence* notes that "[w]here both the duration of the term of an office and the time of its commencement or termination are fixed by a constitution or statute, a person elected or appointed to fill a vacancy in such office holds for the unexpired portion of the term.... " 63C Am.Jur.2d *Public Officers and Employees* § 148 (1997).

The controversy before us involves just such a term of office. The first sentence of § 1975(c) fixes the duration of the term: six years. The second sentence of § 1975(c) fixes the time of termination: the terms of the initial members expire at dates determinable from preexisting law. It is thus unsurprising that President Clinton issued a commission appointing appellee Wilson "for the remainder of the term expiring November 29, 2001." Reading § 1975(c) as a whole, we conclude that it creates fixed six-year terms of office that run with the calendar, rather than with the person. Thus, having been appointed to fulfill the remainder of

Judge Higginbotham's term, expiring November 29, 2001, Wilson's time on the Commission is up.

2.

Our interpretation of § 1975(c) is further confirmed by background considerations such as relevant practices of the Executive Branch. Congress is presumed to preserve, not abrogate, the background understandings against which it legislates. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 1161-62, 137 L.Ed.2d 281 (1997); *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35, 104 S.Ct. 304, 307, 78 L.Ed.2d 29 (1983). "[L]ongstanding practices" of the Executive Branch can "place[ ] a 'gloss' on Congress's action in enacting" a particular provision. *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1119, 1122 (D.C.Cir.2001). Here the consistent treatment of appointments by the Executive Branch provides such a "gloss."

Neither the 1983 Act nor the 1994 Act explicitly addressed delays in appointments of members *after* a predecessor's term had expired. Yet, it appears that every presidential appointee to the Commission since 1983 has been appointed to a term of office expiring six years from the date her predecessor's term expired. Even after the passage of the 1994 Act, with the changes appellees claim it made to the "terms of office," President Clinton appointed no less than four members to the commission for terms of less than six years. Three of these were delayed appointments, and the fourth is Victoria Wilson. Congress has reappropriated funds for the Commission, effectively

reauthorizing it, each year since it was supposed to terminate in 1996, and yet it has not once suggested that the Executive Branch's implementation of the law was incorrect. It is not that the President's "interpretation" of 42 U.S.C. § 1975(c) is due deference, as suggested by appellants, but rather that the Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating. Congress is presumed to be aware of established practices and authoritative interpretations of the coordinate branches. *E.g. National Lead Co. v. United States*, 252 U.S. 140, 147, 40 S.Ct. 237, 239, 64 L.Ed. 496 (1920) ("Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government."); *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 869-70, 55 L.Ed.2d 40 (1978); *In re North*, 50 F.3d 42, 45 (D.C.Cir.1995) (Special Division). Here the Executive Branch's consistent practice provides a presumptive default.

Similarly, the practice of appointing members to the Commission on Civil Rights is but an example of what has been the unbroken position of the Attorney General and the Justice Department on executive appointments. As noted in an opinion issued by the Office of Legal Counsel on May 27, 1999, *Term of a Member of the Mississippi River Commission*:

> Ordinarily, when a statute provides for an appointee to serve a term of years, the specified time of service begins with the appointment. *Case of Chief Constructor Easby*, 16 Op. Att'y Gen. 656 (1880). *A*

> *different rule generally applies to commissions whose members have staggered terms.* There, to preserve the staggering required by statute, each member may serve only until the passage of the specified number of years *calculated from the expiration of his predecessor's term,* even if the member's confirmation and appointment take place after that prior term has expired.

(Emphasis added.) This latter rule has been consistently applied to executive appointments to the Commission on Civil Rights both in its previous incarnation under the 1983 Act and as constituted under the 1994 Act. Appointments have run six years from the date of the expiration of a predecessor's term-not from the date of appointment.[1] It is of course possible that the consistent practice of Presidents Clinton and Bush in appointing members of the

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[1] At oral argument we requested information on Congress's own practices in making appointments to the Commission. The information appellees have provided shows that, unlike the Executive Branch, Congress has been inconsistent in its appointments under *both* the 1983 Act and the 1994 Act, generally failing to indicate termination dates for appointees, and on one occasion indicating the appointment was to run six years from the date of appointment. *See* 142 Cong. Rec. H1233-06 (1996) (Reappointment of Carl Anderson). Most recently however, the Speaker of the House appointed Abigail Thernstrom on January 6, 2001. *See* 147 Cong. Rec. H46-02 (2001). Thernstrom's initial appointment was apparently only to fill the remainder of a vacant seat, because she was reappointed by the Speaker, without objection, to the Commission "for a 6- year term beginning on February 12, 2002." *See* 148 Cong. Rec. H229-09 (2002). This most recent action by the House of Representatives is consistent with our interpretation of the statute.

Commission has been consistently wrong. However, we do not agree with appellee's interpretation compelling that conclusion. Rather, we hold that Presidents Clinton and Bush have it right. That is, the 1983 Act clearly intended to create staggering. The 1994 Act preserved this structure by providing for six-year terms with the terms of the initial commissioners expiring according to their commissions under the 1983 Act.

Furthermore, the consistent practice of the Executive Branch with respect to the filling of midterm vacancies on other bodies with staggered term members has been to fill those vacancies for the duration of the unexpired term, preserving the staggering of terms. That this practice has been longstanding is illustrated by a dispute in the 19th century remarkably similar to the case at bar. In 1882, the Attorney General was asked by the President for his opinion of the term of office of a Commissioner of the District of Columbia who had been appointed after his predecessor failed to serve out a full term. *See Commissioners of the District of Columbia*, 17 Op. Att'y Gen. 476, 476 (1882). The governing statute provided for staggering with respect to the initial appointment of the two Commissioners, but was silent about both subsequent appointments and the filling of vacancies. Nonetheless, the Attorney General concluded that a Commissioner appointed to fill a vacancy could serve only for the remainder of his predecessor's unexpired term. As noted in Part II.A, *supra*, the Attorney General distinguished between terms running with the person and terms running with the calendar. He concluded that there must be "some apt expression of

... intent" to create the latter kind of term, and found such an "apt expression" from the initial staggering of terms. *Id.* at 477. Were it to be otherwise, the staggering of the Commission would deteriorate, and frustrate Congress's purpose in establishing staggering in the first place. *See id.* at 477-78. He concluded that "[t]he fact that no express provision is made for filling vacancies which might arise by death or resignation is not significant." *Id.* at 478. In appointing Victoria Wilson for the remainder of Judge Higginbotham's term of office, President Clinton was following an established Executive Branch practice which was known to Congress. Had Congress intended to disrupt the staggering of members in its 1994 reauthorization of the Commission on Civil Rights, it could have affirmatively indicated that was its intent.

Appellee Wilson argues that if we held that each member of the Commission receives a six-year term of office running from the date of their appointment, her appointment, though reflected in her commission as "for the remainder of the term expiring November 29, 2001," would be effective as a six- year appointment expiring on January 12, 2006. In support of this proposition appellees cite *Quackenbush v. United States,* 177 U.S. 20, 27, 20 S.Ct. 530, 533, 44 L.Ed. 654 (1900), which notes in passing that "the terms of [a] commission cannot change the effect of the appointment as defined by ... statute." That may be. But arguably Wilson may not have been validly *appointed* in the first instance.[2] It seems intuitive, as a

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[2] Wilson accepted her commission from President Clinton with it expressly stating that it was "for the remainder of the term expiring November 29, 2001." Subsequently she failed to challenge the terms of her commission prior to its expiration.

matter of separation of powers, that the language of a nomination, confirmation, and commission cannot alter a statutory term, since it is given to Congress "under its legislative power" to "establish[ ] ... offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and *the fixing of the term for which they are to be appointed* and their compensation--all except as otherwise provided by the Constitution." *Myers v. United States*, 272 U.S. 52, 129, 47 S.Ct. 21, 29, 71 L.Ed. 160 (1926) (Taft, C.J.) (emphasis added). Indeed, this appears to be the position of the Department of Justice. *See, e.g.*, Office of Legal Counsel, Department of Justice, Memorandum for the Executive Clerk, "Term of a Member of the Mississippi River Commission," at 2 (May 27, 1999); *Case of Chief Constructor Easby*, 16 Op. Att'y Gen. 656, 657 (1880).

However, we are not considering an attempt by a President to intentionally circumvent a statute. Nor is this a case of mere scrivener's error. Rather, it is clear that President Clinton intended to appoint Wilson to the *remainder of a term* and not to a full six-year term, a position he reasonably believed existed. Were we to read the statute as prohibiting appointments to the remainder of a term then either Wilson's appointment must be to a six-year term, or alternatively, it was to a non-existent position--the remainder of a term--raising a question as to the validity of her appointment in the first instance. It could be seen as an attempt by the President to appoint Wilson to a position that did not

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Therefore she is arguably bound by those terms, and estopped from asserting an alleged violation of 42 U.S.C. § 1975(c). However, given our resolution, we need not decide.

exist. In that case Wilson would never have been a valid member of the Commission in the first instance. However, because we read the statute as preserving staggering and thus permitting the appointment of Wilson to the remainder of a term of office, that problem need not concern us. As a result, Wilson's appointment by President Clinton was valid, but her term of office has subsequently expired.

3.

In addition to Executive Branch practices implementing a statute, background considerations, or "context," include related provisions in historically antecedent statutes. *E.g. Dep't of Commerce v. U.S. House of Rep.*, 525 U.S. 316, 339-40, 119 S.Ct. 765, 777-78, 142 L.Ed.2d 797 (1999). We need not rely on legislative history, of which there is little of relevance, to determine that staggering of terms was an important feature of the 1983 Act-the plain text and the historical events surrounding the 1983 reauthorization of the Commission demonstrate that fact. Congress went to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features. *See* Pub.L. No. 98-183 § 2(b)(2), (3), 97 Stat. 1301 (1983). The 1983 Act was enacted at a time when Congress was responding to President Reagan's decision to remove and replace first two, then a total of five, members of the Commission. *See* Congressional Research Service, Tenure of Members of the Civil Rights Commission, Memorandum to House Subcommittee on the Constitution, at 2-3, 5 (Dec. 14, 2001). Thus it is evident

that in staggering the membership (among other features), Congress was insulating the Commission from carte blanc replacement at any given time. To suggest that Congress abolished this practical structural feature without any indication that it intended to-evidenced by the fact that the Clinton and Bush Administrations continued to treat the Commission as a body with staggered membership--presents a highly improbable scenario. There is no evidence in or external to the 1994 Act that Congress meant to disrupt the system it had meticulously put into motion.

Appellees suggest that we can deduce Congress's intent to alter the terms of office created by the 1983 Act because the original version of the bill introduced in the House of Representatives to reauthorize the Commission provided that "the current staggering of terms shall continue in effect." H.R. 4999 § 2(c), 103d Cong. (1994). Appellees contend that the removal of this language demonstrates that Congress intended to disrupt the staggering created by the 1983 Act. However, it is at least equally plausible that Congress considered such language simply unnecessary in light of the addition of the provision that the terms of "initial" members "shall expire on the date such term would have expired as of September 30, 1994." 42 U.S.C. § 1975(c). This language demonstrates that Congress intended to preserve the structure created under the 1983 Act.

Indeed, Congress used virtually the exact same language in defining the six-year term of office in both the 1983 and 1994 Acts: "The term of office of each

member of the Commission shall be 6 years." 42 U.S.C. § 1975(c); Pub.L. No. 98-103 § 2(b)(2).[3] If anything this suggests that "term of office" retains the same meaning as it did in 1983. Since there is apparently no dispute that under the 1983 Act a "term of office" ran with the calendar, that same understanding would apply to the 1994 Act.

Appellees' strongest argument that Congress intended to alter the structure of the Commission in adopting the 1994 Act is that it eliminated the provision providing that "any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed." Pub.L. No. 98-103 § 2(b)(2)(B). This argument is not without force. As this Court has recognized: "Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel,* 851 F.2d 1439, 1444 (D.C.Cir.1988). Further, there are numerous statutes creating boards and commissions that expressly provide for filling vacancies. However, here we have not a new agency, but a Commission that Congress had *already* established and was merely reauthorizing. In the process Congress removed provisions pertaining to the initial staggering of the Commission which also included the vacancy provision. What that leaves is not different words, as in *Muscogee (Creek) Nation,* but rather silence. And not just silence, but silence coupled with ambiguous terms, well-established practices of the Executive Branch, and the perpetuation of a

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3 The only difference is that the 1983 Act spelled out "six."

staggered board in the 1994 Act by providing that the terms of "initial" members "shall expire on the date such term would have expired as of September 30, 1994," under the 1983 Act. Had Congress intended to change the established practice for appointing members of the Commission on Civil Rights, it could have affirmatively indicated its intent to do so. It did not. "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234, 119 S.Ct. 1215, 1220, 143 L.Ed.2d 311 (1999). These contextual considerations lead us to the conclusion that the 1994 Act maintained the structure of the Commission as reauthorized in 1983, and thus Wilson was appointed to fill an unexpired term, rather than to a new term of her own.

Finally, we observe that our interpretation, unlike that urged by appellees, avoids anomalous results. As noted above, the creation of staggered terms was one of several structural features adopted in the 1983 Act to establish the Commission as an independent, bipartisan entity, to insulate it from political influence, and to protect its integrity and credibility. The district court contended that its decision would not result in "the complete elimination of all staggering," but acknowledged that its decision would result in the "absence of uniformly staggered terms." The district court further contended that "there is little, if any, substantive difference between those two." We disagree. There is a substantial difference in having predictable terms ensuring that membership will turn over in a periodic and foreseeable manner, and having unpredictable vacancies that permanently disorder member terms. Not the least difference is the diffusion of appointment authority across presidential administrations. Moreover, there is no apparent reason Congress would originally create fixed, staggered terms, as it did under the 1983 Act, only to have them become unpredictably de-staggered over time as some members of the Commission resign, retire, are removed, or die.

Even more telling is the fact that the construction urged by appellees would invite the very sort of political manipulation leading to the reorganization of the Commission in 1983. For example, de-staggering could arise from concerted resignations near the end of a President's term,

allowing an outgoing President to appoint several members of the Commission at once, precluding his successor from appointing any members of the Commission. Such "absurd results" are strongly disfavored. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982). Congress was attempting to insulate the Commission from this kind of carte blanc replacement at any given time. Appellees have no argument as to why these same policy considerations were no longer relevant in 1994 when Congress reauthorized the Commission. The absence of any policy justification for the construction urged by appellees provides yet an additional reason to conclude that Congress, when it established the "initial membership" of the Commission in the 1994 Act, *see* 42 U.S.C. § 1975(c), preserved the staggering it had set in motion in the 1983 Act, and did not intend for the benefits of that provision to be destroyed as some future appointees, either because of random events or strategic behavior inevitably failed to serve out their terms.

III. Conclusion

Since the founding of the republic presidential appointees and their commissions have been a source of litigation, if not consternation. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154, 2 L.Ed. 60 (1803). Here Wilson's commission corresponds to the terms of the statute pursuant to which she was appointed a member of the United States Commission on Civil Rights-42 U.S.C. § 1975. Part (c) of § 1975 provides that the "term of office of each member of the Commission shall be 6 years." The district court erred in holding

that this provision unambiguously requires all Commissioners be appointed for six years, regardless of whether their predecessors completed their terms. Rather, § 1975(c) is also susceptible to the entirely reasonable interpretation that it establishes fixed terms of six years for members of the Commission-terms that run with the calendar-regardless of delay in appointment or the filling of mid-term vacancies. Having considered the two sentences of § 1975(c) in conjunction, practices of the Executive Branch in making appointments to this Commission and other bodies, the prior legislation, and the policy ramifications of the suggested interpretations of § 1975(c), we hold that the latter interpretation is correct. In enacting the 1994 Act, Congress did not disrupt the staggering of terms of Commission members created in the 1983 Act. Therefore, mid-term vacancies are to be filled only for the remainder of the unexpired term. Wilson was properly appointed by President Clinton only for the remainder of the unexpired term of Judge Higginbotham, as her commission indicates, and her service as a Commissioner terminated on November 29, 2001. Kirsanow, having been validly appointed to a vacant seat on the Commission, and having taken the oath of office, is a member of the United States Commission on Civil Rights "with all the powers, privileges, and emoluments thereunto of right appertaining" and has been since December 6, 2001. We reverse the district court and remand with instructions to enter summary judgment for the United States and Kirsanow. It is

So ordered.

District Court Oral Opinion
February 4, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CA 01-2541 GK

United States of America,
et al.
Plaintiffs
vs.

Victoria Wilson
Defendant

Monday, February 4, 2002

Transcript of Status Call
Before the Honorable Gladys Kessler
United States District Judge

APPEARANCES:

For the Plaintiff: Susan Rudy, Esq.
John Schumann, Esq.

For the Defendant: Geoffrey F. Aronow, Esq.
Paul S. Mandell, Esq.
Julia L. Tarver, Esq.

PROCEEDINGS

THE COURT: Good afternoon, everybody.

This is the case of United States versus Victoria Wilson, CA 01-2541.

Would counsel please identify themselves for the record.

MS. RUDY: Good afternoon, Your Honor. Susan Rudy from the Department of Justice.

MR. MANDELL: Good afternoon, Your Honor. Paul Mandell from Arnold and Porter, representing the defendant, Victoria Wilson.

MS. TARVER: Good afternoon. Julia Tarver from Paul, Weiss, representing the intervenor/defendants.

THE COURT: I can't help but note that partners who were here to make their arguments couldn't manage to make it to hear the decision but I'm glad that the government is present at least.

Ladies and gentlemen, as I promised you, I will rule today.

The dispute in this case, as we all know, concerns the appointments of the Plaintiff Peter N. Kirsanow and the Defendant Victoria Wilson to the United States Civil Rights Commission. The facts are virtually undisputed, and I will state them very briefly. They are contained in everybody's statement of material facts, and as I have indicated, I think there is virtually no dispute on them.

President Clinton appointed Judge A. Leon Higginbotham, Junior, to a six-year term as a member of the Commission beginning November 30, 1995. Judge Higginbotham died on December 14, 1998, prior to the expiration of his six-year term. On January 13, 2000, President Clinton then appointed Defendant Victoria Wilson as a member of the Commission to succeed Judge Higginbotham. On December 6, 2001, President Bush appointed the Plaintiff Peter N. Kirsanow to the Commission for a six-year term.

The legal dispute between the parties concerns the requirements of the Civil Rights Commission Amendments Act of 1994, and I should say it concerns the requirement that appointees to the Civil Rights Commission serve fixed six-year terms. The question is whether that six-year term requirement applies to any appointees filling vacancies that result from uncompleted terms, in other words, because of death or resignation or delayed appointment of a Commissioner.

Let me just say initially that both the written briefs and the oral arguments presented by all parties were of an extremely high quality, and the Court greatly appreciates the preparation and the professionalism and the skill that went into those presentations. It was truly a pleasure. Let me also say that this is not an easy case. Neither side has presented insubstantial or frivolous arguments. In short reasonable people could differ about the result to be reached.

Plaintiffs submit that the six-year term requirement does not apply in this case. Their rationale is that the 1994 Amendments Act requires

Commissioners to serve regularly staggered terms on a three-year cycle, and that this staggering scheme, which Plaintiffs believe is essential to maintaining the credibility, the independence, and the impartiality of the Commission, that that would be undermined if appointees to unexpired terms served a full six years, rather than merely serving out the remainder of the unexpired term.

For the following reasons, the Court does conclude that the 1994 Amendments Act, which I'm simply going to refer to, everybody, as the 1994 Act, that it does not mandate regularly staggered terms. Rather, its plain language clearly requires that all Commissioners serve six-year terms, regardless of whether, as in this case, their predecessors completed their terms.

The Court is mindful that the Commission's next planned meeting is February 8th of this week and that all parties are anxious to have the issue resolved so that either Mr. Kirsanow or Ms. Wilson can take their rightful seat on the Commission. Moreover, the Court is also mindful, because of the public attention to this case and the publicity, that the losing party may wish to take an immediate appeal to the Court of Appeals. Consequently, in order to accommodate those concerns, the Court is issuing this rather abbreviated oral opinion which does, however, state the major principles on which my decision rests.

This is a dispute about the meaning of certain statutory phrases and the ascertainment of Congressional intent. Over the years Justice Scalia has eloquently warned of the dangers of trying to divine legislative intent. For those of us who have worked on Capitol Hill in earlier reincarnations his words have

always carried the ring of reality. In order to avoid the unreliable guessing game about what Congress intended, and to bring consistency and uniformity to our decisions which interpret legislative language, the courts have over many many years developed certain fundamental, content-neutral rules to guide us in our task.

The first of those rules, which may seem somewhat obvious, is to simply start with the plain language of the text before us. The plain language of the 1994 Act under discussion establishes a categorical six-year term requirement for all members of the Commission.

That provision, for the record, Section 42 U.S.C. 1975(c) says: The term of office of each member of the Commission shall be six years.

It then goes on to say that the term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994.

This provision is perfectly clear. It contains no exceptions or qualifications, not for delayed appointments and not for appointments to fill unexpired terms. Nor does this provision, nor any other provision of the 1994 Act for that matter, contain language concerning staggering of terms. I will talk more about staggering in a minute or two.

Consequently, on the basis of our first and most fundamental principle of statutory construction, namely reliance on the plain language of the statute, the next of the 1994 Act is clear and compels the conclusion that Commissioners are to serve six-year terms, regardless of whether their predecessors did or did not serve out their full terms.

Second, when a bill as originally introduced contains a particular provision and that provision is not included in the final statute as it is enacted, that constitutes strong evidence that Congress did not wish to enact the substance of that first provision. Here, in this case the 1994 Act had contained a staggering provision when it was first introduced in the United States House of Representatives, and when originally introduced, Section 2 of that bill read: The term of office of each member of the Commission shall be six years and the current staggering of terms shall continue in effect.

This provision, had it remained part of the 1994 Act, would have required that a Commissioner's term be limited to the remainder of an unexpired term in the event that he or she succeeded a Commissioner whose term had not yet expired. However, significantly, that provision that I just read was deleted by the Judiciary Committee and it was deleted from the bill prior to enactment and the final 1994 Act contains no provision for staggering of terms.

Third, another basic principle upon which the courts rely in trying to ascertain Congressional intent is that when Congress affirmatively deletes language which had been included in pre-existing legislation, then Congress means what it said. Here, the 1983 Civil Rights Commission Act, which was the predecessor to the 1994 Act, expressly provided for the staggering of terms every three years and for the use of interim appointments to fill unexpired terms in order to maintain that staggering.

Subsection 2(b) of the 1983 Act that I just referred to, says, the term of office of each member of the Commission shall be six years; except, and then

provision (A) is that members first taking office shall serve as designated by the President for terms of three years, and, significantly, provision (B), any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed.

In short the earlier 1983 Act explicitly covered the facts of this case and provided that any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed. However, and again it is very significant to me, the 1994 Act deleted all of the language contained in the 1983 Act regarding both staggering and interim appointments. Of particular import to this case, in the 1994 Act Congress specifically deleted the language from the 1983 Act providing that any member appointed to fill a vacancy shall serve for the remainder of the term for which the predecessor was appointed. That phrase is not in the 1994 Act.

Fourth, a final principle of statutory construction is that specific language must always be examined in context and in light of the over-all purposes of a piece of legislation. Plaintiffs argue vigorously that deletion of the requirement of staggered terms would seriously undermine the clear Congressional intent to maintain the bipartisan nature of the Commission as well as its integrity and credibility. And that's a serious argument. But there is nothing to suggest that the absence of such a requirement would frustrate Congress' purpose, and there are several reasons for that.

First, we are not talking about the complete elimination of all staggering. We need to be very clear about that. We are always going to have staggering given the very nature of vacancies, whether they be

caused by expiration of terms, death, illness, delayed appointment, et cetera. What we are talking about is the absence of uniformly staggered terms. In terms of ensuring the integrity of the Commission, there is little, if any, substantive difference between those two.

Second, the staggered term requirement was only one amongst a large constellation of protections that were introduced by the 1983 Act to ensure the Commission's bipartisan structure. All of these protections, except staggered terms, remain expressly included in the 1994 Act, and they are important protections. They include fixed terms of six years; limitation on the number of members from any one political party; removal for cause only; and a limitation on the number of appointments any President may make; and also division of appointment responsibility between the Legislative and Executive branches.

Third, a rather cursory examination of the legislative history of the 1983 Act, and I do not want to emphasize here that given the few days since oral argument, there has certainly not been sufficient time for a comprehensive review of that legislative history. What's more, the 1983 Act was controversial and generated extensive Congressional debate. But from what I have looked at and skimmed over, it indicates that staggering was not considered one of the major protections being enacted for the Commission. Rather, the members of Congress in 1983 and in the 1983 debate focused far more of their commentary and their speeches on the provisions relating to removal for cause, limitations on the number of appointments by a President, and the division of appointment responsibility between the Executive and Legislative branches.

If Congress believes that the regularly staggered terms should be among these protections, then, of course, it is free to make its intention explicit by including express language in the statute. It certainly knows how to do so, and that's clear to us because Congress had included that language requiring staggering and interim appointments in the 1983 Act. It included it, as I say, in the 1983 Act, and it also included that kind of language in a number of analogous statutes that were cited by Defendant and Intervenor in their briefs. As it exists now, the 1994 Act simply does not contain the language mandating regularly staggered terms, the language by the way that existed in its predecessor 1983 Act.

In summary, then, on examination of the plain text of the 1994 Act, which is where we must always begin, and in looking at the actions of Congress in rejecting the staggering language which was first contained in the bill when it was introduced as the forerunner to the 1994 Act, and in deleting language which had existed in the 1983 Act, looking at all of those actions, the Court concludes that the 1994 Act requires that all Commissioners, regardless of the length of their predecessor's tenure, serve six year terms.

Accordingly, Defendants' Motion for Summary Judgment must be granted. Plaintiffs' Motion must be denied. This, of course, is an appealable order. Everyone will make their own evaluations and decide what they need to do next.

Counsel, is there anything else that you need to bring up at this time or that you need to inquire about?

Plaintiff.

MS. RUDY: Thank you, Your Honor. I just want to make clear that you are issuing a final judgment today?

THE COURT: Yes, actually you are right. I will issue a written order that incorporates the oral findings and conclusions that I have just made and then, of course, you have to get those from a transcript because you will want the exact wording I used.

MS. RUDY: Thank you, Your Honor.

MS. MANDELL: Nothing further, Your Honor.

MS. TARVER: Nothing further, Your Honor.

THE COURT: Thank you very much, ladies and gentlemen. The parties may be excused.

(Proceedings concluded at 2:49 PM)

CERTIFICATE OF REPORTER

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

WILLIAM D. MCALLISTER
OFFICIAL COURT REPORTER

Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-217

In the Supreme Court of the United States

VICTORIA WILSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
JACOB M. LEWIS
ARA B. GERSHENGORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

19 pp

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner Victoria Wilson's term as a member of the United States Commission on Civil Rights expired on November 29, 2001.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997)	11
Cannon v. *University of Chicago*, 441 U.S. 667 (1979)	11
Hannah v. *Larche*, 363 U.S. 420 (1960)	2
Jones v. *United States*, 526 U.S. 227 (1999)	7, 13
Norfolk Redev. & Hous. Auth. v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30 (1983)	11

Statutes and regulations:

Act of Dec. 21, 2000, Pub. L. No. 106-553, 114 Stat. 2762	3
Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(b), 71 Stat. 634	2
Civil Rights Commission Amendments Act of 1994, Pub. L. No. 103-419, 108 Stat. 4338	3
§ 2, 108 Stat. 4338-4339:	
42 U.S.C. 1975(b)	3
42 U.S.C. 1975(c)	3, 4, 5, 6, 9, 11, 13, 14
42 U.S.C. 1975(e)	3
42 U.S.C. 1975a(a)(1)	1-2
§ 2, 108 Stat. 4342 (42 U.S.C. 1975d)	3
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440	3

Statutes and regulations—Continued: Page

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 748 3
District of Columbia Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 3
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 3
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 3
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 3
United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301 2
§ 2(b)(1), 97 Stat. 1301 2
§ 2(b)(1)(A)-(C), 97 Stat. 1301 2
§ 2(b)(2), 97 Stat. 1301 2-3
§ 2(b)(3), 97 Stat. 1301 3
§ 2(d), 97 Stat. 1301 2

Miscellaneous:

H.R. 4999, 103d Cong., 2d Sess. (1994) 14
H.R. Rep. No. 197, 98th Cong., 1st Sess. (1983) 2
17 Op. Att'y Gen. 476 (1890) 9, 10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 290 F.3d 347.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2002. The petition for a writ of certiorari was filed on August 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Commission on Civil Rights is charged with investigating allegations that United States citizens have been deprived of the right to vote because of "color, race, religion, sex, age, disability, or

national origin," or "as a result of any pattern or practice of fraud." 42 U.S.C. 1975a(a)(1). The Commission has no power to enforce federal law. See generally *Hannah* v. *Larche*, 363 U.S. 420, 440 (1960).

When the Commission was first created in 1957, it was composed of six members appointed by the President with the advice and consent of the Senate. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(b), 71 Stat. 634. The statute that established the Commission provided that "[n]ot more than three of the members shall at any one time be of the same political party." *Ibid.* Under the 1957 Act, the Commission's members were appointed for open-ended terms and served "at the pleasure of the President." H.R. Rep. No. 197, 98th Cong., 1st Sess. 4 (1983).

In 1983, Congress reauthorized the Commission and made a number of changes to its structure. See United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301. The 1983 Act expanded the Commission's membership from six to eight members, while maintaining the requirement of partisan balance by providing that no more than four members at any one time could be of the same political party. § 2(b)(1), 97 Stat. 1301. The Act also provided that four members of the Commission would be appointed by the President, two by the Senate President pro tempore, and two by the Speaker of the House. § 2(b)(1)(A)-(C), 97 Stat. 1301. The Act further specified that "[t]he President may remove a member of the Commission only for neglect of duty or malfeasance in office." § 2(d), 97 Stat. 1301.

The 1983 Act also created a system of fixed and regularly-staggered six-year terms. The Act stated as a general rule that the "term of office of each member of the Commission shall be six years." § 2(b)(2), 97 Stat.

1301. As an exception to that rule, however, the Act provided that half of the Commission's initial members would serve for three-year terms. See § 2(b)(2) and (3), 97 Stat. 1301. The Act further stated that "any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed." § 2(b)(2), 97 Stat. 1301. The effect of those provisions, taken together, was that the terms of office of half of the members of the Commission would expire at every three-year interval.

In 1994, Congress again reauthorized the Commission. Civil Rights Commission Amendments Act of 1994, Pub. L. No. 103-419, 108 Stat. 4338.[1] The 1994 Act preserved the same division of appointment power among the President and congressional leaders, maintained the same requirements for partisan balance among the membership of the Commission, and preserved the protection afforded to Commission members against removal by the President except for cause. § 2, 108 Stat. 4338-4339 (codified at 42 U.S.C. 1975(b) and (e)). Like the 1983 Act, the 1994 Act provided that "[t]he term of office of each member of the Commission shall be 6 years." § 2, 108 Stat. 4338 (codified at 42 U.S.C. 1975(c)). But instead of the complex initial staggering provisions that had followed that sentence in the 1983 Act, the 1994 Act simply stated that "[t]he

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[1] Although the 1994 Act stated that the Commission would terminate on September 30, 1996, see Pub. L. No. 103-419, § 2, 108 Stat. 4342 (codified at 42 U.S.C. 1975d), Congress has continued to appropriate funds for its operations. See Pub. L. No. 107-77, 115 Stat. 748 (2001); Pub. L. No. 106-553, 114 Stat. 2762 (2000); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 105-119, 111 Stat. 2440 (1997); Pub. L. No. 104-134, 110 Stat. 1321 (1996); Pub. L. No. 104-208, 110 Stat. 3009 (1996).

term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994." § 2, 108 Stat. 4338-4339 (codified at 42 U.S.C. 1975(c)).

2. On November 30, 1995, then-President Clinton appointed Judge A. Leon Higginbotham, Jr., to a six-year term as a member of the Commission. Pet. App. 5a. Judge Higginbotham's commission stated that his appointment was "for a term expiring November 29, 2001." *Ibid.* On December 14, 1998, Judge Higginbotham died in office. *Ibid.* On January 13, 2000, President Clinton appointed petitioner Victoria Wilson to the Commission to fill the vacancy created by Judge Higginbotham's death. *Ibid.* Petitioner Wilson's commission stated that her appointment was "for the remainder of the term expiring November 29, 2001." *Ibid.*

On December 6, 2001, President Bush appointed respondent Peter Kirsanow to succeed petitioner Wilson on the Commission. Pet. App. 5a. Respondent Kirsanow was sworn into office the same day, but the Chair of the Commission refused to recognize him as a member and refused to allow him to participate in Commission activities. *Ibid.* The Chair instead continued to recognize petitioner Wilson as a member and allowed her to participate as such. *Ibid.*

3. The United States and respondent Kirsanow filed suit against petitioner Wilson in the United States District Court for the District of Columbia, seeking a declaratory judgment that petitioner Wilson's term had expired and that respondent Kirsanow was therefore a member of the Commission. The other petitioners—*i.e.*, the Commission itself, Mary Frances Berry (the Chair of the Commission), and Cruz Reynoso (the

Vice-Chair of the Commission)—were granted leave to intervene by the district court. See Pet. App. 5a-6a. The district court issued an oral ruling granting summary judgment for petitioners. *Id.* at 29a-39a.

The district court concluded that, under the 1994 Act, each individual appointed to the Commission is entitled to serve for a six-year period, and that petitioner Wilson was therefore the proper occupant of the disputed seat. Pet. App. 31a-32a. The court acknowledged the "serious argument" that "deletion of the requirement of staggered terms would seriously undermine the clear Congressional intent to maintain the bipartisan nature of the Commission as well as its integrity and credibility." *Id.* at 35a. The court stated, however, that its ruling would not result in the "complete elimination of all staggering," *ibid.*, but would simply lead to "the absence of uniformly staggered terms," *id.* at 36a. The court found that result to be unproblematic, based in part on its view that "staggering was not considered one of the major protections being enacted for the Commission." *Ibid.*

4. A unanimous panel of the Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-28a. The court explained that there are "two kinds of official terms." *Id.* at 9a. "One kind of 'term,'" the court stated, refers to "a period of personal service," in which "the term is appurtenant to the person." *Ibid.* (emphasis omitted). The other kind of term refers to "a *fixed slot of time* to which individual appointees are assigned," in which "the person is appurtenant to the term." *Ibid.* "In other words," the court explained, "a 'term of office' can either run with the person or with the calendar." *Ibid.* The court of appeals found that the first sentence of 42 U.S.C. 1975(c), which states that "[t]he term of office of each member of the Commission

shall be 6 years," was reasonably susceptible of either reading. Pet. App. 9a.

The court of appeals next considered the broader context of Section 1975(c) and the structure of the 1994 Act as a whole, as well as the background against which Congress had legislated. The court observed that "every presidential appointee to the Commission since 1983 has been appointed to a term of office expiring six years from the date her predecessor's term expired," Pet. App. 16a, and that "the practice of appointing members to the Commission on Civil Rights is but an example of what has been the unbroken position of the Attorney General and the Justice Department on executive appointments," *id.* at 17a. The court of appeals stated that "[i]n appointing [petitioner] Wilson for the remainder of Judge Higginbotham's term of office, President Clinton was following an established Executive Branch practice which was known to Congress." *Id.* at 20a.

The court of appeals also observed, based on "the plain text and the historical events surrounding the 1983 reauthorization of the Commission," that "Congress went to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features." Pet. App. 22a. The court found it

> evident that in staggering the membership (among other features), Congress was insulating the Commission from carte blanc replacement at any given time. To suggest that Congress abolished this practical structural feature without any indication that it intended to—evidenced by the fact that the Clinton and Bush Administrations continued to

> treat the Commission as a body with staggered membership—presents a highly improbable scenario. There is no evidence in or external to the 1994 Act that Congress meant to disrupt the system it had meticulously put into motion.

Id. at 22a-23a.

The court of appeals rejected petitioners' contention that Congress's intent to alter the Commission's structure could be inferred from the 1994 Act's elimination of the prior provision that "any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed." Pet. App. 24a. The court observed that the 1994 Act involved "not a new agency, but a Commission that Congress had *already* established and was merely reauthorizing. In the process Congress removed provisions pertaining to the initial staggering of the Commission which also included the vacancy provision. What that leaves is not different words, * * * but rather silence." *Ibid.* Relying on the principle that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so," *id.* at 25a (quoting *Jones* v. *United States*, 526 U.S. 227, 234 (1999)), the court concluded that "the 1994 Act maintained the structure of the Commission as reauthorized in 1983, and thus [petitioner] Wilson was appointed to fill an unexpired term, rather than to a new term of her own," *ibid.*

Finally, the court of appeals observed that its interpretation of the 1994 Act "avoids anomalous results." Pet. App. 26a. The court found "no apparent reason Congress would originally create fixed, staggered terms, as it did under the 1983 Act, only to have them become unpredictably de-staggered over time as

some members of the Commission resign, retire, are removed, or die." *Ibid.* The court also noted that under petitioners' construction of the Act, "de-staggering could arise from concerted resignations near the end of a President's term, allowing an outgoing President to appoint several members of the Commission at once, precluding his successor from appointing any members of the Commission." *Id.* at 26a-27a. The court reversed the judgment of the district court and remanded the case with instructions to grant summary judgment for respondents. *Id.* at 28a.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The statutory provision at issue in this case states that "[t]he term of office of each member of the

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[2] Because petitioner Wilson's commission memorializes an appointment "for the remainder of the term expiring November 29, 2001" (Pet. App. 20a), the court of appeals observed, "it is clear that President Clinton intended to appoint Wilson to the *remainder of a term* and not to a full six-year term." *Id.* at 21a. The court noted that, if petitioner Wilson's interpretation of the 1994 Act were the correct one, the validity of her initial appointment could be called into question, since "[i]t could be seen as an attempt by the President to appoint Wilson to a position that did not exist." *Id.* at 21a-22a. The court also noted that, in light of petitioner Wilson's acceptance of the commission and her failure to challenge its terms before the commission expired, "she is arguably bound by those terms, and estopped from asserting an alleged violation of 42 U.S.C. § 1975(c)." *Id.* at 21a n.2. Because the court concluded that the terms of petitioner Wilson's commission reflected a correct understanding of the 1994 Act, it declined to resolve those issues. See *id.* at 21a n.2, 22a.

Commission shall be 6 years." 42 U.S.C. 1975(c). As the court of appeals correctly held (Pet. App. 9a), that language viewed in isolation is ambiguous. As the court explained, Section 1975(c) can be read to provide that "[e]ach individual member of the Commission, however appointed, whenever appointed, is entitled to serve a six-year period of time—*i.e.*, the term runs with the person." *Id.* at 8a-9a. The court recognized, however, that the pertinent language can also be read to "establish[] six-year terms of office, beginning and ending on fixed dates, irrespective of whether and when individuals are appointed to fill them. Under this reading, each member of the Commission must be assigned to a fixed, six-year 'slot' of time—*i.e.*, the term runs with the calendar." *Id.* at 9a.

For more than a century, the consistent understanding of the Executive Branch has been that, when a statute establishes *staggered terms* for a multi-member body, provisions like the one at issue here will be construed to provide for terms that are fixed slots of time. In 1882, Attorney General Brewster provided an opinion for the President addressing that situation. See 17 Op. Att'y Gen. 476 (1890). A mid-term vacancy arose in the office of one of the two civil Commissioners for the District of Columbia. The terms of the Commissioners were governed by the following provision: "The official term of said Commissioners appointed from civil life shall be three years and until their successors are appointed and qualified; but the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years." *Ibid.* The question for the Attorney General was whether the President was authorized to appoint a

successor for a new three-year period, or simply for the duration of the existing term.

The Attorney General began by explaining:

> There are two kinds of official terms, one or the other of which Congress doubtless had in mind in this enactment. In one the term is appurtenant to the person. Thus "collectors * * * shall be appointed for the term of four years" (Rev. Stat., sec. 2613), and in such cases, if the collector dies or resigns, the term which is *his* ends, and his successor begins a like term of four years.
>
> In the other, the term is a legal fixture as to beginning and duration, and the person is, so to speak, appurtenant. Thus certain Senatorial terms commence March 4, 1883, and continue six years. The incumbent on that day may or may not fill out the term. If one dies or resigns the term remains, and some other person or persons may be put in to hold the unexpired part, but not to begin a like term.

17 Op. Att'y Gen. at 476-477.

The Attorney General acknowledged that "[u]ndeniably the former kind is that which is usually prescribed, and when the latter kind is created some apt expression of the intent will be found." 17 Op. Att'y Gen. at 477. The Attorney General found, however, that an intent to create the "latter kind" of official term—*i.e.*, one in which a person appointed mid-term to fill a vacancy serves only for the remainder of the term—could be inferred from the system of staggered appointments that was evidently intended to preserve continuity of operations by preventing both seats on the D.C. Commission from becoming vacant at once. The Attorney General observed that such a

> scheme of arranging the several official terms in a fixed consecutive series has been long and successfully applied to official bodies in all departments of the Government.
>
> The vital essence of such a plan is that the term is fixed, and the officer, as it were, belongs to it.
>
> When Congress therefore so arranges the first appointment that the full terms shall begin consecutively at the end of one and of two years, does it not substantially follow the plan on which the Senate and like bodies are organized, and with the same intent.

Id. at 477-478.

As the court of appeals recognized (Pet. App. 17a), "the unbroken position of the Attorney General and the Justice Department" has been that, where the governing statute establishes staggered terms for a multi-member commission, an individual appointed to fill a mid-term vacancy serves only until the expiration date of his predecessor's term. *Id.* at 17a-18a. Because Congress is presumed to preserve, not abrogate, the background understandings against which it legislates, see, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997); *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), that consistent Executive Branch practice provides considerable support for the court of appeals' construction of Section 1975(c).

The interpretive rule described above, moreover, "has been consistently applied to executive appointments to the Commission on Civil Rights both in its previous incarnation under the 1983 Act and as

constituted under the 1994 Act." Pet. App. 18a. And, as the court of appeals observed, "Congress has re-appropriated funds for the Commission, effectively re-authorizing it, each year since it was supposed to terminate in 1996, and yet it has not once suggested that the Executive Branch's implementation of the law was incorrect." *Id.* at 16a-17a. Although the court of appeals did not find prior Executive Branch practice to be dispositive of the interpretive question before it, see *id.* at 18a-19a ("It is of course possible that the consistent practice of Presidents Clinton and Bush in appointing members of the Commission has been consistently wrong."), it reasonably concluded that this practice supported a "fixed-slot" reading of the statute.[3]

2. The historical development of the statutory provisions governing the Commission's structure further supports the court of appeals' interpretation of Section

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[3] There is no merit to petitioners' contention (Pet. 20) that the court of appeals "improperly allowed the executive branch, through its recent appointment practices, effectively to rewrite the statute." The court stated that it was "not that the President's 'interpretation' of 42 U.S.C. § 1975(c) is due deference, * * * but rather that the Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating." Pet. App. 17a. The court of appeals also did not "ignore[] the significance of *the Congress's* appointment practice." Pet. 22. Rather, the court examined prior congressional practice but found it to be uninstructive in construing the pertinent statutory language because "Congress has been inconsistent in its appointments under *both* the 1983 Act and the 1994 Act, generally failing to indicate termination dates for appointees, and on one occasion indicating the appointment was to run six years from the date of appointment." Pet. App. 18a n.1. The court of appeals also observed that the most recent congressional appointment to the Commission is consistent with the court's interpretation of the statute. *Ibid.*

1975(c). In 1983, Congress substantially amended the statute, going "to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features." Pet. App. 22a. The legislative history of the 1994 Act does not suggest that Congress intended to effect a significant modification of these features. This Court has recognized that "Congress is unlikely to intend any radical departure from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999). As the court of appeals observed, "[t]o suggest that Congress abolished this practical structural feature without any indication that it intended to * * * presents a highly improbable scenario." Pet. App. 23a.

3. Petitioners contend (Pet. 18) that "Congress provided for and then removed a special rule for 'vacancy' appointments." They observe (*ibid.*) that the 1983 Act addressed in detail the manner in which the regular staggering should be implemented, and included language dealing specifically with the filling of mid-term vacancies. Petitioners argue (Pet. 18-19) that Congress's deletion of that language in 1994 implies an affirmative intent to adopt a different rule for the filling of such vacancies. The court of appeals correctly rejected that contention, explaining that "here we have not a new agency, but a Commission that Congress had *already* established and was merely reauthorizing. In the process Congress removed provisions pertaining to the initial staggering of the Commission which also included the vacancy provision. What that leaves is not different words, * * * but rather silence." Pet. App. 24a. The court further observed that "[h]ad Congress intended to change the established practice for appoint-

ing members of the Commission on Civil Rights, it could have affirmatively indicated its intent to do so. It did not." *Id.* at 25a. Congress's deletion of language specifically defining the length of time for which mid-term appointees will serve leaves that question to be resolved by reference to the established background presumption that, on a multi-member body whose members serve staggered terms, a mid-term appointee serves only until the expiration date of his predecessor's term.

Petitioners also attach significance (see Pet. 9-10) to the fact that the original version of the bill that became the 1994 Act provided that the "current staggering of terms shall continue in effect." H.R. 4999, 103d Cong., 2d Sess. § 2(c) (1994). That language was not included in the final version of the Act. As the court of appeals recognized, however, Congress may have "considered such language simply unnecessary in light of the addition of the provision that the terms of 'initial' members 'shall expire on the date such term would have expired as of September 30, 1994.'" Pet. App. 23a (quoting 42 U.S.C. 1975(c)). The fact that Congress might have expressed its intent even more clearly, by specifically defining the length of time for which a mid-term appointee would serve, does not detract from the force of the applicable interpretive presumption in construing the Act in its current form.

4. Contrary to petitioners' contention (Pet. 5), the ruling of the court of appeals will not "adversely affect[]" the autonomy and effectiveness of the Commission. Rather, as the court of appeals understood, it is petitioners' construction that "would invite the very sort of political manipulation"—including destaggering from "concerted resignations" at the end of an outgoing President's term—that led Congress to restructure the

Commission in 1983. Pet. App. 26a-27a. Regular fixed staggering also serves "to insulate the Commission from * * * carte blanc replacement at any given time." *Id.* at 27a. The court of appeals correctly determined that Congress "did not intend for the benefits of that provision to be destroyed as some future appointees, either because of random events or strategic behavior inevitably failed to serve out their terms." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
JACOB M. LEWIS
ARA B. GERSHENGORN
Attorneys

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